Linkages between Religious Extremism and Freedom of Expression

by

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Summary:

This paper looks at the linkages between religious extremism and freedom of expression or incitement to hatred provisions in human rights law and practice while sampling 'advocacy of religious hatred' as a transnational phenomena. It also analysis the different interpretations of the human rights law by different entities in the same state. Finally it discusses the management of the reaction attributed to such 'advocacy' by both the alleged offender and the aggrieved and further examine if various measures for such management are permissible under Articles 19 and 20 of the ICCPR.

Introduction:

It is well recognized that under international law freedom of expression and thought is a norm and limitations on this norm are themselves quiet limited. These limitations can be prescribed by law in case of manifesting one's religion and the scope of such a law should remain limited to the protection of public safety, order, health, or morals or the fundamental rights and freedom of others[2]. Likewise, the freedom of expression carries with it special duties and responsibilities and restrictions that can be enacted under domestic law provided they are necessary[3]. Lastly, the advocacy of religious hatred inciting violence is allowed to be prohibited through a domestic legislation[4]. This paper only confines itself to the discussion on the concept of 'advocacy of religious hatred', its dynamics and management.

Hierarchy of 'rights' and 'limitations'

The ICCPR pronounces the right of freedom of expression itself, but not the limitations. It leaves the structuring of the limitations to the domestic laws. In other words, the treaty directly gives the 'right' but the 'limitations' on the said right are to be prescribed by domestic laws. That is the starting point of disagreements. The right is contracted in the text of the treaty between states but not the limitations that are left to diverse interpretations when enacted by different states in different languages and with different approaches of interpretation of elements of limitations mentioned in articles 18, 19 and 20 of the ICCPR. Another way of looking at it is to argue that the right of freedom of thought and expression are placed at a higher pedestal of a treaty whereas even the permissible limitations are relegated to a lower pedestal of a domestic law. The result would be conflicting appreciation of the limitations based on diversity of domestic laws and internal understandings of the structures within the state.

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[2] Article 18(3) of ICCPR.
[3] Article 19(2) & (3) of ICCPR.
[4] Article 20(2) of ICCPR.

Reaction to an incidence; its dynamics:

Now let us assume that a person in one state has issued a statement or drawn a figure or written a text that has incited a 'reaction' in another state.

The 'reaction' from within the state can be at least at three different levels. At level one, will be the reaction by the aggrieved state to the state of alleged offender. At level two, shall be the reaction by the academics or forums of one state and at level three shall be the reaction of the masses or that of the public. At all three levels the reactions are totally different and sometime they can be in opposing directions.

For example, if someone makes a speech abusing the Prophet of one religion, then the reaction at a state level shall be formal and possibly less hard. From level two which is the academia the reaction may possibly be better articulated with tempers still under control. Whereas, at the level of the public and masses the reaction could be spontaneous, unruly and leading to violence. Another qualifier is about the masses. The masses in developed world and masses in underdeveloped world may react differently and within the said mass of public the people from villages may react yet differently from the people in towns; all interpret on a given day and on a given incidence freedom of expression differently.

In a given incidence of defamation or blasphemy there are naturally two parties; one who commits the said offence and thus would be an offender or atleast an 'alleged' offender and the second would be the aggrieved that may include (state, academia or public).

The complication that arises here is an issue of 'double restrain' on the part of the aggrieved which is sometimes a further a cause of another cycle of violence. The aggrieved is being asked to exercise restrain by first accepting that the offender had a right to offend in exercise of his right of speech and then the aggrieved is further asked to restrain himself from expression of displeasure or protest. Likewise in case of instance of advocacy of religious hatred, the aggrieved is being asked to restrain by patiently listening to advocacy aimed against him and then further restrain himself from reacting or protesting. In certain cases the aggrieved feels more hurtful due to this double restraint framework that he has to bear with.

A legal course available does lift considerably the burden of 'double restrain'. There is some usefulness in registering of a case by those who proclaimed to be aggrieved. The expected rioting may be defused. The law and order situation was kind of averted with the registration of the case. The cries to kill the alleged offender' die down as well. One view is that the existing mechanism of registering a case and feeling of having a remedy was a great buffer between a rash reaction of the masses and a calculated appraisal of

the facts through judicial process. The well known Chicago trial of one Thawwur Rana who is tried for criminal conspiracy to attack the publisher of cartoon in Denmark, raises an argument that if a legal recourse or an administrative buffer was available, would he have been still motivated to conspire? However, it must be made clear that this argument should not be stretched to evolve a justification for a law that is inherently in violation of the international human rights law.

What is being said is simply that 'blasphemy' or 'injury to one's feeling' is a version of the aggrieved and let that version only be allowed to be registered and investigated. The law should not be judgmental itself but only permit an opportunity to register a version that may well be turned down later through judicial or administrative scrutiny.

What constitutes 'advocacy' mentioned in article 20 of ICCPR?

What constitute advocacy of hatred is another question of fact and partially an issue of interpreting Article 20 of ICCPR. Is it a series of facts that constitutes advocacy or a onetime action? Will a single speech constitute advocacy as we say in Article 20 or will a series of speeches constitute advocacy? The drawing of a figure or a picture may not be advocacy per se but what about its deliberate repetition? What such a figure is disseminated or circulated as a campaign? A text authored once may not be advocacy but if someone repeats it then would the repetition itself constitute 'advocacy'? Is there a certain threshold or frequency of circulation or publication that needs to be crossed in order for a text or a figure to become an act of advocacy? What then shall be the basis of individual responsibility ? Who is liable? The author or the one who circulates? Or both? One way to look at this to think of a distinction between the owner of the intellectual property (article, drawing, text or speech, computer figure, electronic message etc) versus the one who publishes it or circulates it. These the questions that one needs to address.

Every overt act of an individual is his property and a product of his independent thoughts and intellect. This intellectual property could be a conversation, a speech, an article, a figure, a mark, product or invention etc and he has the right of its creation and ownership and use under Article 18 of ICCPR and the said right is invariably guaranteed under the various constitutions. But it is interesting that under the jurisprudence of Intellectual Property country wise, there are inherent restrictions on the use of the intellectual property in certain conditions and circumstances. These are imposed often through licensing regimes or regulators.

Implementing Article 19 and 20 or managing the 'incidence':

Any work of intellect or thought freely expressed that may or may not be intended to injure the religious sentiments of any community or faith needs management when a transnational reaction is triggered.

The obvious first step of management is to make efforts to prevent such an incidence. That prevention cannot be through coercive measures like penal laws, otherwise the 'coercive' aspect shall constitute limitation on the freedom of expression. However, it is submitted that non-coercive canvassing by the state as a general advice to its subjects, shall not constitute limitation on the freedom of expression and can be permissible under the articles 19 and 20 of ICCPR. The non-actionable pursuation or canvassing by the state is not a measure that constitute limitation on the freedom of speech. Nothing in the international law on human rights stops the state to take a position domestically that its citizens should respect the rights and sentiments of people of all faiths. Article 19 or 20 do not prevent the state to communicate to its subjects that while they have freedom of expression yet at their discretion they must consider exercising appropriate self restraint where there is a likelihood of injuring the feelings of people of other faith. The state can express- which it often expresses- this very position. It can also translate it into guidelines or non coercive recommendations.

The second measure to manage would take place when the incidence triggering transnational reaction has taken place and then there may be a need to possibly provide some kind of a legal buffer between the offending incidence and the possible reaction. For instance, the aggrieved may be provided an option to go to the court of law against the alleged offender. Or even an administrative commission or a committee or for that matter any forum can be designated under domestic law where the aggrieved may take their complaint. The said forum could examine the said complaint. The forum may have the competence to ask for comments or may itself give recommendations. Creation of such forums as a domestic measure will not be violation of Article 19 or 20 of ICCPR. On the contrary it could become a venue to contain the reaction and the forum could itself interpret the law and the ICCPR to examine if the incidence in hand falls in the very limited exceptions of freedom of expression or not.

Such a forum can also instead of deciding the complaint itself can may be given competence to recommend through its appropriate foreign ministry to take up the issue with the state where the alleged offender resides so that the stated position of that state is then better known to the public in the state of the aggrieved. This will actually become an opportunity to the state where the offender resides to make an appropriate political statement to reflect that it has no intention to hurt religious feelings of another faith.

Raising levels of tolerance:

The third stage of management of an incidence would be managing the aggrieved and persuading them to raise their level of tolerance to an act of an alleged offender which may be reckless or irresponsible. Tolerance level- for that matter -needs to be raised even if the offending act is well deliberated by an offender.

However, the raising or lowering of the level of tolerance is an incidence again of 'advocacy to incite for violence' which now is adopted by the aggrieved when the management both to persuade for prevention of incidence and the subsequent legal or administrative recourse, fails. This advocacy develops its own dynamics. It is sometimes inciting for hostility and violence and leads to acts like rioting, mass protests and public outcry. In certain extreme cases, it provokes targeted attempts to murder at a transnational level.

Any incidence triggers advocacy to commit violence by extremist elements of any religion. A very limited and almost one sided world view is depicted in this kind of advocacy for violence by the sermon giver who has no in depth appreciation of the vision of his own faith.

For example, 'the threshold to bear religious criticism in the Islamic Jurisprudence is far higher than generally believed. Advocacy for inciting violence is mostly attributed to the *sermon maker* who is leading the prayers in the mosques but is not a true scholar of Islam *(alim)*. He can whip up the sentiments through his public speaking skills and least research opinions or *fatwas* on the other hand the *alims* historically have been very reluctant to issue a *fatwa* or to advocate for incitement to commit violence on basis of criticism of religion. The *alims*- it seems- have withdrawn themselves from the debate of tolerance for religious criticism and as a result the *sermon giver* has fully exploited this recent consequent gap in the jurisprudence of religious tolerance. It is submitted that the *alim* needs to be brought back into this debate as well thought out strategy and should be encouraged to lead the debate' [5]. The sermon giver in a mosque may cite from Quran to forcefully say that people of certain religions can never be friends of Muslims and it is a divine verdict, therefore they are our enemies and thus call to violence against an enemy is justified. On the other hand, a scholar of Islam while being mindful of the treaties that were done by Muslims with people of other faiths, would argue that nothing in Quran forbids Muslims to enter into with treaties even with their 'enemies' and Muslims have a duty to honour the treaties. The discourse of an alim or a scholar is wholly different from the discourse of a sermon giver or *waiz*. Without appreciating this distinction, the strategy for raising the threshold of religious tolerance cannot work. If the only strategy is to ban 'advocacy' for violence or incitement and

[5] Formulation also presented before OCHR sponsored Panel Discussion in Geneva June 2011.

penalize the sermon giver for violating domestic law or ICCPR, it is not likely to work wonders. Since Muslim thought is effectively inter-state, therefore, the strategy for a counter-narrative to reduce religious extremism has to be a global effort well thought out collectively.